

**WILLIAM H. "BILL" RAY, P.C.
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FILED
COURT OF CRIMINAL APPEALS
1/11/2019
DEANA WILLIAMSON, CLERK

January 10, 2019

Court of Criminal Appeals
Supreme Court Building
201 West 14th Street, Room 106
Austin, Texas 78701
via efilng

Re: Johnnie Dunning vs. Texas
CCA No. PD-0445-18
Trial Court No. 0632435D

Dear Sir/Mam,

Please be advised that I discovered an error in the reporter's record in this case. I contacted the clerk's office on January 9, 2019, and was informed to comply with Tx.R.App.Pro. 34.6 (e)(3) in order to properly supplement the record.

In that regard, you will find the filed copies of the Motion and Order (two separate documents, both agreed) directing the Court Reporter and the District Clerk of Tarrant County to file an Amended Record (Volume Two), and a Supplemental Record.

The Reporter's Record has already been prepared and the trial court has instructed the reporter and District Clerk to file these items as soon as possible.

I am providing copies of these items now so you will know these items are in the process of being sent to you.

Thank you.

Sincerely,

/s/ William H. "Bill" Ray

cc: Tarrant County DA
State Prosecuting Attorney

ATTORNEY FILING DOCUMENT INFORMATION

/S/ WILLIAM H. "BILL" RAY

WILLIAM H. "BILL" RAY

BAR NO. 16608700

ATTORNEY FOR DEFENDANT

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NO. 0632435

THE STATE OF TEXAS)	IN THE DISTRICT
)	
VS.)	COURT NUMBER 371
)	
JOHNNIE DUNNING)	TARRANT COUNTY, TEXAS

MOTION TO CORRECT REPORTER'S RECORD

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, the Defendant, and files this Motion to Correct Reporter's Record, and in support of this motion shows:

This Motion is filed pursuant to *Tex.R.App.Pro 34.6 (e)(3)*.

This Court conducted a Post Conviction DNA Testing hearing, pursuant to *Art. 64, et sec, Code of Criminal Procedure*, on February 28, 2017.

The trial court denied relief to the Defendant, and the case was appealed to the Second Court of Appeals. On March 1, 2018, the Second Court of Appeals issued an opinion reversing the decision of the trial court. *Dunning v. State, No. 02-17-00166-CR, March 1, 2018, designated for publication.*

The State timely filed a Petition for Discretionary Review, which was granted on June 20, 2018. The PDR Number in the Court of Criminal Appeals is PD-0445-18. Both parties filed briefs and the case was submitted to the Court of Criminal Appeals on August 29, 2018.

No decision has been made as of the date of filing of this motion.

Subsequent to submission in the Court of Criminal Appeals, it was discovered by the undersigned counsel, William Ray, that there is an error in the Reporter's Record of the hearing on February 28, 2017. That error has been verified by the court reporter, and is not disputed by the State.

The error appears at the following location:

In Volume 2, Page 50, Lines 4-9, (February 28, 2017 hearing), the following testimony is written in the record that was originally prepared and filed on appeal:

[By Mr. Ray, Counsel for Johnnie Dunning, direct examination of

Ms. Amy Lee, a criminalist with the San Francisco Police Department]

4 Q. Yeah. That's what I'm getting at. Your
5 testing shows there's two people's DNA on this kid's
6 underwear or shorts, whatever you want to call them,
7 one of them is the victim and one of them's Johnnie
8 Dunning.

9 A. Correct.

The error, which was discovered after submission to this Court, is the lack of inclusion of the word "not", between the word "them's" and "Johnnie" and "them's"

should actually read “them is” at Lines 7-8, Page 50, Volume 2 of the Reporter’s Record on the hearing on February 28, 2017. The corrected language should read, “one of them is not Johnnie Dunning”.

This error in the record was not caught by either the State, Dunning, or the Court of Appeals. Further, the parties agree that while the insertion of the word “not”, and changing “them’s” to “them is” does change the meaning in this particular sentence at RR-2, Page 50, Lines 7-8, the overall testimony and nature of the testimony does not change, as Ms. Lee’s testimony, both before and after this specific question, was that Johnnie Dunning was in fact excluded as a contributor in the relevant samples tested.

The corrected transcription should read:

4 Q. Yeah. That’s what I’m getting at. Your
5 testing shows there’s two people’s DNA on this kid’s
6 underwear or shorts, whatever you want to call them,
7 one of them is the victim and one of them is not
8 Johnnie Dunning.

9 A. Correct.

Counsel was directed by the Court of Criminal Appeals to bring this matter to

the attention of the trial court, pursuant to *TRAP 34.6 (e) (3)* and request that the trial court order the reporter's record corrected, and filed with the Court of Criminal Appeals, and for the Tarrant County District Clerk to supplement the record with this motion and order in this case.

PRAYER

Defendant Johnnie Dunning Prays that this Court order the Court Reporter to certify the change in an amended record, and file this amended record in the Court of Criminal Appeals, and further, that this Court order the Tarrant County District Clerk to prepare and file a supplemental clerk's record, containing this motion and order, with the Court of Criminal Appeals.

RESPECTFULLY SUBMITTED,

/S/ WILLIAM H. "BILL" RAY

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above Motion to Correct Reporter's Record was electronically delivered to the Tarrant County District Attorney's Office on the date shown by the District Clerk's file-stamp.

/S/ WILLIAM H. "BILL" RAY

WILLIAM H. "BILL" RAY

I certify that on the 9th day of January, 2019, I conferred with Mr. Steve Conder, Attorney for the State and he does not oppose the granting of this motion.

/S/ WILLIAM H. "BILL" RAY

WILLIAM H. "BILL" RAY

*Agreed by
Steve*

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NO. 0632435

THE STATE OF TEXAS)	IN THE DISTRICT
)	
VS.)	COURT NUMBER 371
)	
JOHNNIE DUNNING)	TARRANT COUNTY, TEXAS

**COURT'S ORDER GRANTING MOTION TO
CORRECT REPORTER'S RECORD**

Came upon to be heard the motion of the Defendant, Johnnie Dunning, to correct the Reporter's Record of the hearing on February 28, 2017.

The Court notes this motion is unopposed by the State.

The Court makes the following findings and orders:

The Court finds this Motion is filed pursuant to *Tex.R.App.Pro 34.6 (e)(3)*.

The Court finds that there was a Post Conviction DNA Testing hearing, pursuant to *Art. 64, et sec, Code of Criminal Procedure*, conducted on February 28, 2017.

The Court finds that relief was denied to the Defendant, and the case was appealed to the Second Court of Appeals. On March 1, 2018, the Second Court of Appeals issued an opinion reversing the decision of the trial court. *Dunning v. State, No. 02-17-00166-CR, March 1, 2018, designated for publication.*

The Court finds that the State timely filed a Petition for Discretionary Review, which was granted on June 20, 2018. The PDR Number in the Court of Criminal

Appeals is PD-0445-18. Both parties filed briefs and the case was submitted to the Court of Criminal Appeals on August 29, 2018.

The Court finds that no decision has been made as of the date of filing of this motion.

The Court finds that subsequent to submission in the Court of Criminal Appeals, it was discovered by the undersigned counsel, William Ray, that there is an error in the Reporter's Record of the hearing on February 28, 2017. That error has been verified by the court reporter, and is not disputed by the State.

The Court finds that the current record, and as located at Volume 2, Page 50, Lines 4-9, (February 28, 2017 hearing), states as follows:

[By Mr. Ray, Counsel for Johnnie Dunning, direct examination of

Ms. Amy Lee, a criminalist with the San Francisco Police Department]

4 Q. Yeah. That's what I'm getting at. Your
5 testing shows there's two people's DNA on this kid's
6 underwear or shorts, whatever you want to call them,
7 one of the is the victim and one of them's Johnnie
8 Dunning.

9 A. Correct.

The Court finds that this error in the record was not caught by either the State, Dunning, or the Court of Appeals. Further, the Court finds that parties agree that while

the insertion of the word “not”, and changing “them’s” to “them is” does change the meaning in this particular sentence at RR-2, Page 50, Lines 7-8, the overall testimony and nature of the testimony does not change, as Ms. Lee’s testimony, both before and after this specific question, was that Johnnie Dunning was in fact excluded as a contributor in the relevant samples tested.

The Court finds that the corrected record, which has been reviewed by the Court, with the changes made, should now read as follows:

The corrected transcription should read:

- 4 Q. Yeah. That’s what I’m getting at. Your
5 testing shows there’s two people’s DNA on this kid’s
6 underwear or shorts, whatever you want to call them,
7 one of them is the victim and one of them is not
8 Johnnie Dunning.
- 9 A. Correct.

The Court hereby Orders Court Reporter to file an Amended Volume Two of the transcription of the testimony on February 28, 2017 with the Court of Criminal Appeals, and further Orders the Tarrant County District Clerk to supplement the record with this motion and order in this case.

SO ORDERED.

DATE: 1 10 19



MOLLIE WESTFALL
JUDGE

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